No.

In the Supreme Court of the United States

HENRY SCHEIN, INC., ET AL., PETITIONERS

v.

ARCHER AND WHITE SALES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL F. SCHUSTER
CYNTHIA KEELY TIMMS
LOCKE LORD LLP
2200 Ross Avenue, Suite 2800
Dallas, TX 75201

RICHARD C. GODFREY
BARACK S. ECHOLS
KIRKLAND & ELLIS LLP
300 North LaSalle Street
Chicago, IL 60654

KANNON K. SHANMUGAM
Counsel of Record
JONATHAN B. PITT
LIAM J. MONTGOMERY
CHARLES L. MCCLOUD
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

QUESTION PRESENTED

Whether the Federal Arbitration Act permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless."

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Henry Schein, Inc.; Danaher Corporation; Instrumentarium Dental Inc.; Dental Equipment LLC; Kavo Dental Technologies, LLC; and Dental Imaging Technologies Corporation. Respondent is Archer and White Sales, Inc.

Henry Schein, Inc., has no parent corporation, and no publicly held company holds 10% or more of its stock.

Instrumentarium Dental Inc.; Dental Equipment LLC; Kavo Dental Technologies, LLC; and Dental Imaging Technologies Corporation are wholly owned subsidiaries of petitioner Danaher Corporation. Danaher Corporation has no parent corporation, and no publicly held company holds 10% or more of its stock.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statutory provision involved 2
Statement 2
A. Background 4
B. Facts and procedural history 5
Reasons for granting the petition 10
A. The decision below conflicts with the decisions of other courts of appeals 11
B. The decision below is incorrect 15
C. The question presented is an important and recurring one that warrants the Court's review in this case 20
Conclusion 24
Appendix A 1a
Appendix B 18a
Appendix C 39a
Appendix D 45a

TABLE OF AUTHORITIES

Cases:

14 Penn Plaza LLC v. *Pyett*, 556 U.S. 247 (2009) 19
Agere Systems, Inc. v. *Samsung Electronics Co.*, 560 F.3d 337 (5th Cir. 2009) 8
Allied-Bruce Terminix Cos. v. *Dobson*, 513 U.S. 265 (1995) 20
American Express Co. v. *Italian Colors Restaurant*, 570 U.S. 228 (2013) 15, 22
AT&T Mobility LLC v. *Concepcion*, 563 U.S. 333 (2011) 4, 15, 22

Page

Cases—continued:

AT&T Technologies, Inc. v. *Communications Workers of America*, 475 U.S. 643 (1986) 13, 16, 17, 18
Belnap v. *Iasis Healthcare*, 844 F.3d 1272 (10th Cir. 2017) 5, 14
BG Group, PLC v. *Republic of Argentina*, 134 S. Ct. 1198 (2014) 5
Buckeye Check Cashing, Inc. v. *Cardegna*, 546 U.S. 440 (2006) 17
CompuCredit Corp. v. *Greenwood*, 565 U.S. 95 (2012) 15
Dean Witter Reynolds, Inc. v. *Byrd*, 470 U.S. 213 (1985) 18, 19
Douglas v. *Regions Bank*, 757 F.3d 460 (5th Cir. 2014) ....*passim*
Dream Theater, Inc. v. *Dream Theater*, 21 Cal. Rptr. 3d 322 (Cal. Ct. App. 2004) 12
EEOC v. *Waffle House, Inc.*, 534 U.S. 279 (2002) 18
Erving v. *Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972) 7
First Options of Chicago, Inc. v. *Kaplan*, 514 U.S. 938 (1995) 4, 5, 15, 16
Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) 4, 22
Green Tree Financial Corp.-Alabama v. *Randolph*, 531 U.S. 79 (2000) 19
Jones v. *Waffle House, Inc.*, 866 F.3d 1257 (11th Cir. 2017) 11, 14
Lawrence v. *Comprehensive Business Services Co.*, 833 F.2d 1159 (5th Cir. 1987) 7
Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) 3, 19
Moses H. Cone Memorial Hospital v. *Mercury Construction*, 460 U.S. 1 (1983) 4, 15, 18
Qualcomm Inc. v. *Nokia Corp.*, 466 F.3d 1366 (Fed. Cir. 2006) 8, 11, 12
Rent-A-Center, West, Inc. v. *Jackson*, 561 U.S. 63 (2010) ....*passim*

Page

Cases—continued:

Sauer-Getriebe KG v. *White Hydraulics, Inc.*, 715 F.2d 348 (7th Cir. 1983) 7
Shearson/American Express, Inc. v. *McMahon*, 482 U.S. 220 (1987) 19
Simply Wireless, Inc. v. *T-Mobile US, Inc.*, 877 F.3d 522 (4th Cir. 2017) 11, 13
Southland Corp. v. *Keating*, 465 U.S. 1 (1984) 22
Stolt-Nielsen S.A. v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) 2, 22
Turi v. *Main St. Adoption Services, LLP*, 633 F.3d 496 (6th Cir. 2011) 12

Statutes:

Federal Arbitration Act, 9 U.S.C. 1-16 ..... *passim*
9 U.S.C. 2 ..... 2, 4, 17
9 U.S.C. 4 ..... 6, 19
9 U.S.C. 16(a) 8
Sherman Antitrust Act, 15 U.S.C. 1 5
28 U.S.C. 1254(1) 2

Miscellaneous:

Karen Chesley, *Who Determines If A Dispute Is Arbitrable*, Nat'l L.J. (Nov. 16, 2017) 21
David Horton, *Arbitration About Arbitration*, 70 Stan. L. Rev. 363 (2018) 21
Liz Kramer, *Tenth Circuit Resolves One Arbitrability Circuit Split, But Creates Another*, Arbitration Nation <tinyurl.com/arbitrationnation> 21
Neal Ross Marder et al., *Waffle House Arbitration Ruling May Reach Past Eleventh Circuit*, Law360 (Aug. 17, 2017) <tinyurl.com/wafflehouseruling> 11, 21

In the Supreme Court of the United States

No.

HENRY SCHEIN, INC., ET AL., PETITIONERS

v.

ARCHER AND WHITE SALES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Henry Schein, Inc.; Danaher Corporation; Instrumentarium Dental Inc.; Dental Equipment LLC; Kavo Dental Technologies, LLC; and Dental Imaging Technologies Corporation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 878 F.3d 488. The district court's opinion denying petitioners' motions to compel arbitration (App., *infra*, 18a-38a) is unreported. The magistrate judge's order granting petitioners' motions (App., *infra*, 39a-44a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

This case presents a recognized and vitally important circuit conflict concerning the interpretation of the Federal Arbitration Act (FAA). Under the FAA, "parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 68-69 (2010). This Court has held that "[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Id.* at 70. The question presented is whether the FAA permits a court to decline to enforce an agreement delegating

questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless."

Respondent is a former distributor of certain petitioners. Respondent's distributorship agreements required it to arbitrate disputes "arising under or related to" the agreements, including disputes over arbitrability. Respondent nevertheless filed a complaint in federal court, alleging that petitioners had violated federal and state antitrust laws by wrongfully restricting or terminating respondent's distributorship rights under the agreements. Petitioners moved to compel arbitration, citing the provisions in the parties' arbitration agreements delegating questions of arbitrability to an arbitrator.

The district court denied the motions to compel arbitration, and the court of appeals affirmed. The court of appeals invoked its own exception to the rule that parties may delegate questions of arbitrability to arbitrators—an exception that purportedly applies when a court analyzes the merits of the movant's arbitrability arguments and concludes they are "wholly groundless."

The court of appeals' decision exacerbates an entrenched split of authority in the federal courts of appeals on the validity of the "wholly groundless" exception. And it cannot be reconciled either with the FAA's text or with its "primary purpose": namely, to "ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (internal quotation marks and citations omitted). As it has in many other recent cases, this Court should grant certiorari to correct the lower courts' arbitration-unfriendly interpretation of the FAA and reaffirm the "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

A. Background

Congress enacted the FAA almost a century ago to "reverse the longstanding judicial hostility to arbitration agreements." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Section 2 of the FAA—the Act's "primary substantive provision," *Moses H. Cone Memorial Hospital* v. *Mercury Construction*, 460 U.S. 1, 24 (1983)—guarantees that "[a] written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. Section 2 reflects "both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011).

Section 2 of the FAA requires courts to "place[] arbitration agreements on an equal footing with other contracts[] and * * * enforce them according to their terms." *Rent-A-Center*, 561 U.S. at 67. The FAA's command that courts rigorously enforce agreements to arbitrate according to their terms applies in disputes over "gateway" issues, such as whether a particular claim falls within the scope of the arbitration provision or whether a nonsignatory to the agreement is required to participate in arbitration. *Id.* at 69. And it applies to disputes over an equally important antecedent question: who decides such gateway issues, the court or the arbitrator? See *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943-944 (1995).

Although courts, not arbitrators, presumptively resolve gateway disputes, parties may supersede that gen-

eral rule by "clearly and unmistakably" agreeing to "arbitrate arbitrability." *First Options*, 514 U.S. at 943. One way for parties to accomplish that result is by including a so-called "delegation provision" in their arbitration agreement. A delegation provision is "simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 561 U.S. at 70. When parties include such a provision in their arbitration agreement, the delegation of authority to the arbitrator applies to virtually all gateway disputes, including disputes over "whether their agreement covers a particular controversy." *Id.* at 68-69; see *BG Group, PLC* v. *Republic of Argentina*, 134 S. Ct. 1198, 1206 (2014).

A contract need not contain an express delegation provision to "clearly and unmistakably" delegate arbitrability questions to an arbitrator. As every court of appeals to consider the question has held, an agreement incorporating rules that themselves delegate arbitrability to the arbitrator, like the rules of the American Arbitration Association (AAA), provides the requisite clear and unmistakable delegation. See, *e.g.*, *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272, 1283-1284 (10th Cir. 2017).

B. Facts And Procedural History

1. Petitioners manufacture and distribute dental equipment. During the relevant period, respondent distributed, sold, and serviced dental equipment on behalf of many different companies, including some of the petitioners. C.A. App. 18-20.

In 2012, respondent filed suit against petitioners in the United States District Court for the Eastern District of Texas, alleging violations of Section 1 of the Sherman Antitrust Act, 15 U.S.C. 1, and state antitrust law. C.A. App.

18. The complaint sought "tens of millions of dollars" in damages stemming from petitioners' alleged conspiracy to boycott respondent and to restrict respondent's sales territories under certain distribution agreements. *Id.* at 16-17, 24-30. The complaint also included a summary request for unspecified injunctive relief, stating as follows:

> Plaintiff also seeks injunctive relief. The violations set forth above are continuing and will continue unless injunctive relief is granted.

Id. at 35-36. The complaint contained no further allegations concerning the requirements for obtaining injunctive relief. Since initiating this suit, respondent has never sought any form of preliminary or other injunctive relief.

2. Petitioners moved to compel arbitration of respondent's claims. C.A. App. 68-156, 166-181; see 9 U.S.C. 4. Petitioners' motions were based on respondent's distribution agreements, which provided in relevant part:

> This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes relating to trademarks, trade secrets or other intellectual property of Pelton & Crane) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association. The place of arbitration shall be Charlotte, North Carolina.

C.A. App. 504.

Respondent opposed petitioners' motions, claiming that the boilerplate request for injunctive relief in its complaint rendered the *entire* dispute triable to a jury rather than an arbitrator. In response, petitioners noted that, where, as here, an arbitration provision contains a carve-

out for injunctive relief, courts routinely read the exception to permit injunctive relief from a court (1) on a preliminary basis to preserve the status quo *pending* arbitration or (2) on a permanent basis *after* the plaintiff secures an arbitration award in its favor. See, *e.g.*, *Erving* v. *Virginia Squires Basketball Club*, 468 F.2d 1064, 1067 (2d Cir. 1972); *Lawrence* v. *Comprehensive Business Services Co.*, 833 F.2d 1159, 1163 (5th Cir. 1987); *Sauer-Getriebe KG* v. *White Hydraulics, Inc.*, 715 F.2d 348, 350 (7th Cir. 1983); cert denied, 464 U.S. 1070 (1984).

A magistrate judge—to whom the case had been assigned for all pretrial purposes—granted petitioners' motions to compel arbitration. App., *infra*, 39a-44a. The magistrate judge explained that, while on "the most superficial level, [respondent's] lawsuit is clearly an action seeking injunctive relief," the complaint "does not seek *only* injunctive relief, and the Court is persuaded that damages * * * are the predominant relief sought." *Id.* at 41a. The magistrate judge accordingly determined that "there is in this case a plausible construction [of the arbitration provision] calling for arbitration." *Id.* at 41a-42a. On that basis, the magistrate judge concluded that the question whether the agreements' carve-out for actions seeking injunctive relief applied to petitioners' claims "should properly be left for the arbitrator to decide." *Id.* at 42a.

3. Respondent asked the district court to reconsider the magistrate judge's order compelling arbitration. More than three years later, the district court vacated the magistrate judge's order and denied petitioners' motions to compel arbitration. App., *infra*, 18a-38a. Explicitly interpreting the "[s]cope of [the] [a]rbitration [c]lause," *id.* at 26a, the court reasoned that the agreements' exception

for "actions seeking injunctive relief" meant that respondent's inclusion of a perfunctory request for injunctive relief entitled respondent to a jury trial on the entirety of its claims. *Id.* at 27a-28a. Of particular relevance here, the court further determined that any contrary reading of the agreements' arbitration provision would be "wholly groundless." *Id.* at 34a-37a.

4. Petitioners filed an interlocutory appeal under the FAA, see 9 U.S.C. 16(a), and the court of appeals affirmed. App., *infra*, 1a-17a.

The court of appeals based its decision on its earlier holding in *Douglas* v. *Regions Bank*, 757 F.3d 460 (5th Cir. 2014), that, "[i]f an 'assertion of arbitrability [is] wholly groundless,' the court need not submit the issue of arbitrability to the arbitrator." App., *infra*, 11a (quoting *Douglas*, 757 F.3d at 463). In *Douglas*, as in this case, the court of appeals considered whether to compel arbitration based on the existence of a delegation provision in the parties' arbitration agreement. The court of appeals acknowledged that, under this Court's precedents, "[d]elegation provisions * * * normally require an arbitrator to decide in the first instance whether a dispute falls within the scope of the arbitration provision." 757 F.3d at 462. But relying on decisions from the Federal Circuit, the court of appeals purported to identify an exception to that rule where "the argument that the claim at hand is within the scope of the arbitration agreement is 'wholly groundless.'" *Id.* at 464 (citing *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366, 1371 (Fed. Cir. 2006); *Agere Systems, Inc.* v. *Samsung Electronics Co.*, 560 F.3d 337 (5th Cir. 2009)). The court of appeals adopted this test over a dissent from Judge Dennis, who contended that the

court's newfound "wholly groundless" exception "appear[ed] to be contrary to Supreme Court authority." *Ibid.* (Dennis, J., dissenting).

In this case, petitioners argued to the court of appeals that applying the "wholly groundless" standard "would allow the court to construe the bounds of [the] arbitration clause before an arbitrator can do so—effectively obviating the entire purpose of delegating the gateway question to the arbitrator in the first place." App., *infra*, 14a. But the court rejected that argument, concluding that, "if the ['wholly groundless'] doctrine is to have any teeth, it must apply where, as here, an arbitration clause expressly excludes certain types of disputes." *Id.* at 15a-16a. The court went on to determine, based on its own interpretation of "the four corners of the contract," *id.* at 16a, that there was "no plausible argument that the arbitration clause applies here to an 'action seeking injunctive relief,'" *ibid.* The court of appeals reached that conclusion despite the magistrate judge's contrary determination that "there is in this case a plausible construction [of the arbitration clause] calling for arbitration." *Id.* at 41a-42a.[1]

---

[1] The court of appeals separately considered whether the parties had "clearly and unmistakably" delegated the issues of arbitrability to the arbitrator. App., *infra*, 6a-11a. Petitioners contended that, because the agreements in question expressly incorporated AAA rules, they contained the requisite delegation of arbitrability disputes. *Id.* at 8a-9a. Respondents disagreed, arguing that the agreements' incorporation of AAA rules should be interpreted as applying only to cases outside the carve-out for "actions seeking injunctive relief." *Id.* at 9a-10a. The court of appeals determined that it "need not decide which reading to adopt here because *Douglas* provides us with another avenue to resolve this issue: the 'wholly groundless' inquiry." *Id.* at 11a.

5. Petitioners sought a stay of further proceedings in the district court while their appeal was pending. The district court denied petitioners' motion, and the court of appeals (after carrying the stay motion with the merits) denied petitioners' motion as well. App., *infra*, 45a. Petitioners thereafter filed an application with this Court seeking a stay of proceedings pending a petition for a writ of certiorari (No. 17A859). On March 2, 2018, the Court granted petitioners' application and entered a stay pending the disposition of this petition.

REASONS FOR GRANTING THE PETITION

This case presents a straightforward conflict among the courts of appeals on an important and frequently recurring question involving the FAA. There is an entrenched conflict on the question whether the FAA permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless." Four courts of appeals, including the court below, have held that courts may resolve gateway disputes over arbitrability themselves, even if the arbitration agreement contains a delegation provision, if the court determines that the underlying claim for arbitration is "wholly groundless." But two other courts of appeals have held that, under this Court's precedents, disputes about arbitrability must be decided by an arbitrator whenever the parties have delegated that issue to an arbitrator, regardless of the court's views about the merits of the arbitrability issue. Only this Court can resolve that conflict, and this case is an excellent vehicle in which to do so. The petition for a writ of certiorari should therefore be granted.

A. The Decision Below Conflicts With The Decisions Of Other Courts of Appeals

The court of appeals' decision reinforces an existing conflict among the circuits on the question whether the FAA permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless." Other courts of appeals have expressly recognized the conflict among the circuits on this issue, see, *e.g.*, *Jones* v. *Waffle House, Inc.*, 866 F.3d 1257, 1268-1269 (11th Cir. 2017); *Simply Wireless, Inc.* v. *T-Mobile US, Inc.*, 877 F.3d 522, 528 (4th Cir. 2017), as have legal commentators, see Neal Ross Marder et al., *Waffle House Arbitration Ruling May Reach Past Eleventh Circuit*, Law360 (Aug. 17, 2017) <tinyurl.com/wafflehouseruling>. That conflict, on an important question of federal law, plainly warrants the Court's review.

1. Four courts of appeals, including the court of appeals in this case, have held that a court may decline to compel arbitration, despite the parties' delegation of questions of arbitrability to an arbitrator, if the court concludes that the claim for arbitration is "wholly groundless."

In the earliest of those decisions, *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366 (Fed. Cir. 2006), a patentee filed suit against a competitor alleging infringement of patents related to a particular technology. See *id.* at 1368-1369. The defendant moved to compel arbitration and to stay the litigation, citing an arbitration provision in the parties' license agreement concerning a different technology. See *id.* at 1369. A divided panel of the Federal Circuit vacated the district court's order denying a stay, concluding that the court had erred in believing that it was

required to rule on the arbitrability of the defendant's defenses itself. See *id.* at 1374. The Federal Circuit stated that the court should first have considered "who has the primary power to decide arbitrability under the parties' agreement." *Id.* at 1371. Pertinently for present purposes, the Federal Circuit added that, if the court determined that the parties did intend to delegate the power to decide arbitrability to an arbitrator, "then the court should perform a second, more limited inquiry to determine whether the assertion of arbitrability is 'wholly groundless.'" *Ibid.* (quoting *Dream Theater, Inc.* v. *Dream Theater*, 21 Cal. Rptr. 3d 322, 326 (Cal. Ct. App. 2004)).

The Sixth Circuit adopted a materially identical standard in *Turi* v. *Main St. Adoption Services, LLP*, 633 F.3d 496 (2011). There, the defendants sought to compel arbitration based on a provision requiring arbitration of "[a]ny controversy or claim arising out of th[e] agreement." *Id.* at 506. The district court denied the defendants' motion, and the Sixth Circuit affirmed. See *id.* at 499. The Sixth Circuit recognized that "the question of whether a particular dispute is arbitrable is distinct from the issue of who should decide that question." *Id.* at 511. But like the Federal Circuit in *Qualcomm*, the Sixth Circuit reasoned that, "even where the parties expressly delegate to the arbitrator the authority to decide the arbitrability of the claims related to the parties' arbitration agreement, this delegation applies only to claims that are at least *arguably* covered by the agreement." *Ibid.* The Sixth Circuit went on to conclude that, although some of the plaintiffs' claims were clearly covered by the arbitration provisions, others were clearly not, thus obviating the "need for an arbitrator to decide the arbitrability of any of the plaintiffs' claims." *Ibid.*

In *Douglas*, *supra*, a divided panel of the Fifth Circuit joined those circuits in adopting the "wholly groundless" exception. Citing the Federal Circuit's *Qualcomm* decision, the Fifth Circuit determined that, "even *if* there is a delegation provision" in the parties' agreement, "the court must ask whether the averment that the claim falls within the scope of the arbitration agreement is wholly groundless." 757 F.3d at 464. The court determined that the defendant's motion to compel arbitration in that case rested on a "wholly groundless" interpretation of the arbitration agreement because the plaintiff's claim "has nothing whatsoever to do with her arbitration agreement." *Ibid.*

Judge Dennis dissented. He contended that the "wholly groundless" test "appear[ed] to be contrary to Supreme Court precedent" holding that, "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." 757 F.3d at 468 (quoting *AT&T Technologies, Inc.* v. *Communications Workers of America*, 475 U.S. 643, 649 (1986)). He added that "the Supreme Court would likely reject the majority's approach as being contrary to its previous decisions." *Ibid.*

Most recently, in *Simply Wireless*, the Fourth Circuit held that "a district court must give effect to a contractual provision clearly and unmistakably delegating questions of arbitrability to an arbitrator, unless it is clear that the claim of arbitrability is wholly groundless." 877 F.3d at 528 (internal quotation marks and citation omitted). The Fourth Circuit noted the existence of a circuit conflict on the validity of the "wholly groundless" exception, *id.* at 528 n.5, but nevertheless reasoned, relying on the Fifth Circuit's decision in *Douglas*, that a court should not enforce a delegation provision "when a party's assertion that

a claim falls within an arbitration clause is frivolous or otherwise illegitimate," *id.* at 529.

2. The preceding decisions of the Fourth, Fifth, Sixth, and Federal Circuits conflict with decisions of the Tenth and Eleventh Circuits.

In *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272 (2017), the Tenth Circuit reversed a district court's denial of a motion to compel arbitration of a dispute between a surgeon and his employer. See *id.* at 1274. The plaintiff "urge[d]" the Tenth Circuit "to adopt the 'wholly groundless' approach of the Fifth, Sixth, and Federal Circuits." *Id.* at 1285. But "[h]aving thoroughly considered its merits," the Tenth Circuit "decline[d] to adopt" the "wholly groundless" exception. *Id.* at 1286. The Tenth Circuit noted that such an exception "appears to be in tension with language of the Supreme Court's arbitration decisions—in particular, with the Court's express instruction that when parties have agreed to submit an issue to arbitration, courts must compel that issue to arbitration without regard to its merits." *Ibid.* Reviewing this Court's decisions, the Tenth Circuit explained that the Court had "made clear that when parties agree to submit an issue to arbitration, courts are bound to effectuate the parties' intent by compelling arbitration—no matter what the court thinks about the merits of the issue." *Id.* at 1287 (footnote omitted).

In *Jones*, the Eleventh Circuit "join[ed] the Tenth Circuit in declining to adopt * * * the wholly groundless exception." 866 F.3d at 1269. Like the Tenth Circuit, the Eleventh Circuit reasoned that the "wholly groundless" exception "runs against the Supreme Court's unambiguous instruction that lower courts may not 'delve into the merits of the dispute.'" *Id.* at 1269 (quoting *Douglas*, 757 F.3d at 468 (Dennis, J., dissenting)). The Eleventh Circuit

observed that enforcing delegation provisions without regard to the merits of the underlying dispute was "altogether consonant with the FAA's 'liberal federal policy favoring arbitration agreements'" and its "overarching purpose" of "ensur[ing] the enforcement of arbitration agreements according to their terms." *Id.* at 1270 (quoting *Moses H. Cone*, 460 U.S. at 24, and *AT&T Mobility*, 563 U.S. at 344). The court added that "concerns about efficiency cannot justify adopting the wholly groundless exception"; even if questions of judicial economy could be considered, it was "by no means clear that the courts would save time by initially deciding the gateway questions rather than referring them to the arbitrator for resolution." *Ibid.*

3. There can be little doubt that there is a substantial circuit conflict on the question presented, or that the question is ripe for the Court's review. Decisions from six courts of appeals have fully developed the relevant arguments on both sides of the question. And given the depth of the conflict, there is no realistic prospect that it will resolve itself without the Court's intervention. Further review is therefore warranted.

B. The Decision Below Is Incorrect

This Court has repeatedly instructed lower courts to enforce arbitration agreements according to their terms. See, *e.g.*, *American Express Co.* v. *Italian Colors Restaurant*, 570 U.S. 228, 233 (2013); *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95, 98 (2012); *AT&T Mobility*, 563 U.S. at 339; *Rent-A-Center*, 561 U.S. at 67. The court of appeals ignored that emphatic instruction and instead held that courts may decide gateway questions of arbitrability themselves, even when the parties have delegated the resolution of arbitrability disputes to an arbitrator. That holding cannot stand.

1. "[A]rbitration is simply a matter of contract between the parties." *First Options*, 514 U.S. at 943. Consistent with that principle, parties may "agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center*, 561 U.S. at 68-69. "Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *First Options*, 514 U.S. at 943. And if the parties agree to arbitrate arbitrability, that agreement must be enforced according to its terms under the FAA. See *Rent-A-Center*, 561 U.S. at 70.

In addition, this Court has mandated that an arbitration agreement should be strictly enforced regardless of a court's views of the merits of the claim made by the party seeking to compel arbitration. For example, in *AT&T Technologies, Inc.* v. *Communications Workers of America*, 475 U.S. 643 (1986), the Court explained that the requirement to compel arbitration under valid agreements applies "whether the claims of the party seeking arbitration are "'arguable' or not, indeed even if it appears to the court to be frivolous." *Id.* at 649-650. Whatever the merits of the movant's claim, "[t]he courts * * * have no business weighing the merits of the grievance," because "[t]he agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *Id.* at 650.

2. Despite this Court's clear holdings that parties are free to delegate threshold disputes of arbitrability to arbitrators, the court of appeals refused to enforce the delegation provision at issue in this case solely on the ground that petitioners' claim for arbitrability was "wholly

groundless." App., *infra*, 11a-16a. That holding cannot be reconciled with the FAA or with this Court's decisions applying it.

a. First and foremost, the court of appeals' decision finds no basis in the text of the FAA. Section 2 of the FAA establishes that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. That provision does not authorize judicial interference with arbitration agreements; rather, it simply "places arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006). And it is undisputed that one party's belief that another party's claims under a contract are "wholly groundless" is not a valid basis for revoking the contract entirely. To the contrary, as explained above, the FAA directs courts to enforce a party's claim for arbitration "even if it appears to the court to be frivolous." *AT&T Technologies*, 475 U.S. at 649-650. Under that rule, "if a court determines that there is clear and unmistakable evidence that the parties agreed to arbitrate arbitrability but nevertheless believes that an underlying claim is almost certainly not subject to arbitration, the court must still order the parties to arbitrate arbitrability." *Douglas*, 757 F.3d at 468 (Dennis, J., dissenting).

In adopting and applying the "wholly groundless" exception, the court of appeals conflated the question of who *decides* arbitrability with the discrete question of who *prevails* on arbitrability. Because the parties here have already answered the first question and assigned responsibility for resolving arbitrability disputes to the arbitrator, there was no need for the court of appeals to reach the second question. The court did so anyway, engaging in an

extended analysis of whether petitioners' claim found "footing within the four corners of the contract." App., *infra*, 16a.

The court of appeals thereby violated the general principle that, "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT&T Technologies*, 475 U.S. at 649. It cannot seriously be disputed that that is exactly what the court of appeals did; indeed, in *Douglas*, the court of appeals forthrightly acknowledged that the "wholly groundless" exception "necessarily requires the courts to examine and, to a limited extent, construe the underlying agreement." 757 F.3d at 464. As this Court has admonished, however, that is exactly what lower courts should avoid doing in cases in which the parties have agreed to arbitrate.

b. The "wholly groundless" exception is also inconsistent with the "liberal federal policy favoring arbitration agreements" embodied in the FAA. *Moses H. Cone*, 460 U.S. at 24. "By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 218 (1985).

The court of appeals acknowledged that policy in the decision below, yet reasoned that enforcing the arbitration provision would require it to "override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract." App., *infra*, 16a (emphasis omitted) (quoting *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 294 (2002)). But again, under the parties' agreements, assessing intent and deciding what is or is not "inconsistent with the plain text of the contract" are tasks for

the arbitrator. The court of appeals usurped that authority, elevating its own views over the parties' actual intent as documented in their agreements to arbitrate arbitrability.

To be sure, cases may arise in which a party seeks to compel arbitration for reasons that could be considered "wholly groundless" under any definition of that term. But that hardly means that the party resisting arbitration will invariably be forced to arbitrate against its will. It is a foundational premise of the FAA that arbitrators will be "competent, conscientious, and impartial," *Mitsubishi Motors*, 473 U.S. at 634, and fully capable of deciding even the most complex issues, see *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 232 (1987). Courts must presume that arbitrators can be trusted faithfully to analyze the scope of the disputed provision and to refuse to allow arbitration of claims that fall outside it. The "wholly groundless" exception rejects that presumption, and in that respect is simply a new way of expressing the age-old "judicial hostility to arbitration." *Green Tree Financial Corp.-Alabama* v. *Randolph*, 531 U.S. 79, 89 (2000).

In any event, courts "cannot rely on * * * judicial policy concern[s]" to refuse to honor arbitration agreements. *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 270 (2009). A party that proves the existence of a valid arbitration agreement is entitled to "an order directing that such arbitration proceed *in the manner provided for in such agreement.*" 9 U.S.C. 4 (emphasis added). And that is true despite the possibility that a court might later disagree with the arbitrator's assessment of arbitrability. When the parties have clearly and unmistakably delegated the question of arbitrability to an arbitrator, the initial decision is the arbitrator's—and the arbitrator's

alone—to make. See *Dean Witter Reynolds*, 470 U.S. at 217.

C. The Question Presented Is An Important And Recurring One That Warrants The Court's Review In This Case

The question presented in this case is a recurring one of substantial legal and practical importance. The Court's intervention is necessary to safeguard the FAA's commitment to the enforceability of commercial arbitration agreements and to provide clarity and uniformity in the law. This case, which cleanly presents the question, is an excellent vehicle for the Court's review.

1. As demonstrated by this Court's frequent grants of review in cases involving the FAA, commercial arbitration is a critical part of our Nation's legal system. Among other valuable benefits, arbitration agreements allow private parties to resolve a broad range of disputes while avoiding the costs associated with traditional litigation. Parties frequently seek to maximize those efficiencies by delegating questions of arbitrability to the arbitrator as well.

Under the "wholly groundless" test adopted by the court of appeals, however, a court may effectively nullify an arbitration agreement whenever it concludes, based on its own interpretation of the arbitration provision, that there is not "a legitimate argument that th[e] arbitration clause covers the present dispute." App., *infra*, 11a (alteration in original). The predictable upshot of that approach would be to unleash a wave of potentially protracted "mini-trials" over arbitrability in the district courts, "unnecessarily complicating the law and breeding litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 275 (1995).

This case well illustrates that concern. Petitioners first moved to compel arbitration in 2012. Yet more than five years later—a period of time long enough for the parties' dispute to have been arbitrated several times over—petitioners, respondent, and the courts are still attempting to resolve the threshold question of who should decide arbitrability. The court of appeals' adoption of the "wholly groundless" exception has thus effectively nullified the very efficiencies that led the parties to agree to arbitration in the first place. Absent this Court's intervention, more parties who seek to arbitrate will similarly be forced to expend significant time and money simply to enforce their arbitration clauses as written.

The deepening circuit conflict on this question has also upended parties' settled expectations regarding the enforceability of arbitration agreements. Numerous commentators have recognized "the uncertainty created by this circuit split." Karen Chesley, *Who Determines If A Dispute Is Arbitrable*, Nat'l L.J. (Nov. 16, 2017); see also, *e.g.*, Marder, *supra*; David Horton, *Arbitration About Arbitration*, 70 Stan. L. Rev. 363, 371 & n.54 (2018); Liz Kramer, *Tenth Circuit Resolves One Arbitrability Circuit Split, But Creates Another*, Arbitration Nation (Jan. 26, 2017) <tinyurl.com/arbitrationnation>.

The uncertainty is exacerbated by the vagueness of the "wholly groundless" inquiry itself. The facts of this case are again instructive: the magistrate judge expressly found that there was a plausible construction of the parties' agreement that required arbitration of respondent's claims, but the district court and the court of appeals reached the opposite conclusion on the same record. Unless this Court acts, parties who have bargained for arbitration agreements that include delegation provisions will

be unsure whether those provisions are binding and enforceable. That result is contrary to the FAA's "principal purpose" of "ensur[ing] that private arbitration agreements are enforced according to their terms." *AT&T Mobility*, 563 U.S. at 344.

In addition, the circuit conflict on the validity of the "wholly groundless" exception will "encourage and reward forum shopping." *Southland Corp.* v. *Keating*, 465 U.S. 1, 15 (1984). As matters currently stand, indisputably valid delegation provisions in arbitration agreements are always enforceable in some circuits, but only sometimes enforceable in others. Courts in the latter circuits (such as the Eastern District of Texas, where this case was litigated) will accordingly become the forums of choice for plaintiffs seeking to capitalize on "judicial hostility to arbitration agreements." *Gilmer*, 500 U.S. at 24. Inconsistency of that sort is intolerable under the FAA, which was intended to establish nationwide standards for the enforcement of arbitration agreements. Indeed, this Court routinely grants certiorari even where a circuit conflict is shallow (or non-existent) when the question presented concerns the interpretation of the FAA. See *New Prime Inc.* v. *Oliveira*, cert. granted, No. 17-340 (Feb. 26, 2018);[2] *Italian Colors*, 570 U.S. at 228; *AT&T Mobility*, *supra*; *Stolt-Nielsen S.A.*, 559 U.S. at 662. In light of that practice, this case, which presents a clear and important

---

[2] *New Prime* presents a distinct question from the one in this case, but it likewise concerns the circumstances under which a court must enforce a valid delegation provision in an arbitration agreement. See Pet. at i, *New Prime*, *supra* (No. 17-340). If the Court grants the instant petition, it may wish to order that petitioners' case and *New Prime* be argued on the same day in October Term 2018, allowing the Court to consider the questions in the two cases at the same time.

conflict involving six circuits, cries out for the Court's review.

2. This case is an apt vehicle in which to decide the question presented. Whether the "wholly groundless" exception is consistent with the FAA is a pure question of law, and it formed the sole basis for the court of appeals' decision below. As such, there is no threshold obstacle to reviewing and resolving that question in this case. In addition, the courts of appeals have comprehensively analyzed the arguments for and against the existence of a "wholly groundless" exception to arbitrability. Accordingly, this case provides the Court with an excellent opportunity to consider and resolve the question presented.

There is no basis in law or logic for imposing on the FAA an exception for "wholly groundless" claims of arbitrability. The court of appeals' contrary decision was erroneous, and the Court should grant the petition for certiorari to correct that error and resolve a circuit conflict that is affecting parties to arbitration agreements across the country.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL F. SCHUSTER
CYNTHIA KEELY TIMMS
LOCKE LORD LLP
2200 Ross Avenue,
Suite 2800
Dallas, TX 75201

RICHARD C. GODFREY
BARACK S. ECHOLS
KIRKLAND & ELLIS LLP
300 North LaSalle Street
Chicago, IL 60654

Counsel for Petitioner
Henry Schein, Inc.

KANNON K. SHANMUGAM
JONATHAN B. PITT
LIAM J. MONTGOMERY
CHARLES L. MCCLOUD
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

Counsel for Petitioners
Danaher Corporation;
Instrumentarium Dental
Inc.; Dental Equipment
LLC; Kavo Dental Technologies, LLC; and Dental
Imaging Technologies Corporation

MARCH 2018

APPENDIX

TABLE OF CONTENTS

Appendix A:	Court of appeals opinion, Dec. 21, 2017	1a
Appendix B:	District court memorandum opinion and order, Dec. 7, 2016	18a
Appendix C:	Magistrate judge memorandum order, May 28, 2013	39a
Appendix D:	Court of appeals order, Dec. 21, 2017	45a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-41674

ARCHER AND WHITE SALES, INC.,
Plaintiff-Appellee

v.

HENRY SCHEIN, INC., DANAHER CORPORATION, INSTRUMENTARIUM DENTAL INC., DENTAL EQUIPMENT LLC, KAVO DENTAL TECHNOLOGIES LLC, AND DENTAL IMAGING TECHNOLOGIES CORPORATION,
Defendants-Appellants

FILED: December 21, 2017

Before HIGGINBOTHAM, GRAVES, and HIGGINSON, Circuit Judges.

OPINION

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Sued by a competitor for antitrust violations, Defendants-Appellants sought to enforce an arbitration agreement. The magistrate judge granted the motion to compel

arbitration, holding that the gateway question of the arbitrability of the claims belonged to an arbitrator. The district court reversed, holding it had the authority to rule on the question of arbitrability and the claims at issue were not arbitrable. We now affirm.

I.

Five years ago, Plaintiff-Appellee Archer and White Sales, Inc. ("Archer"), a distributor, seller, and servicer for multiple dental equipment manufacturers, brought this suit against Defendant-Appellants Henry Schein, Inc. and Danaher Corporation, allegedly the largest distributor and manufacturer of dental equipment in the United States, and certain wholly-owned subsidiaries of Danaher.

The suit alleges violations of Section 1 of the Sherman Antitrust Act and the Texas Free Enterprise and Antitrust Act, contending that the Defendants' activities occurred over the preceding four years and are "continuing" violations, and seeking both damages ("estimated to be in the tens of millions of dollars") and injunctive relief.[1] The district court referred the case to a United States Magistrate Judge.

Defendants moved to compel arbitration pursuant to a clause in a contract between Archer and Pelton & Crane,

---

[1] Archer alleges that Defendants conspired "to fix prices and refuse to compete with each other" and to "force their common supplier Danaher and its various subsidiaries to terminate and/or reduce the distribution territory of their price-cutting distributor Archer Dental." It also alleges that the Defendants "carried out their conspiracy through a series of unlawful activities, including, but not limited to agreements not to compete, agreements to fix prices, and boycotts."

allegedly a Defendant's predecessor-in-interest (the "Dealer Agreement"). The arbitration clause reads as follows:

> Disputes. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of Pelton & Crane), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]. The place of arbitration shall be in Charlotte, North Carolina.

Following a hearing, the magistrate judge issued a Memorandum Order holding that: (1) the incorporation of the AAA Rules in the arbitration clause clearly evinced an intent to have the arbitrator decide questions of arbitrability; (2) there is a reasonable construction of the arbitration clause that would call for arbitration in this dispute; and (3) the *Grigson* equitable estoppel test, which both sides agree is controlling in their dispute, required arbitration against both signatories and non-signatories to the Dealer Agreement.[2]

The district court vacated the magistrate judge's order and held that the court could decide the question of

---

[2] *Archer & White Sales, Inc. v. Henry Schein, Inc.*, No. 2:12-cv-572-JRG-RSP, 2013 WL 12155243 (E.D. Tex. May 28, 2013), *vacated*, 2016 WL 7157421 (E.D. Tex. Dec. 7, 2016).

arbitrability, and that the dispute was not arbitrable because the plain language of the arbitration clause expressly excluded suits that involved requests for injunctive relief. The court declined to reach the question of equitable estoppel.[3]

Defendants appealed.[4]

II.

We review a ruling on a motion to compel arbitration *de novo*.[5] "Enforcement of an arbitration agreement involves two analytical steps."[6] First, a court must decide "whether the parties entered into *any arbitration agreement at all*."[7] This inquiry is one of pure contract formation, and it looks only at whether the parties "form[ed] a valid agreement to arbitrate some set of claims."[8] The next step is to determine "whether [the dispute at issue]

---

[3] *Archer & White Sales, Inc. v. Henry Schein, Inc.*, No. 2:12-cv-572-JRG, 2016 WL 7157421, at *9 (E.D. Tex. Dec. 7, 2016).

[4] Defendants filed an interlocutory appeal pursuant to 9 U.S.C. § 16(a)(1)(C). *See Al Rushaid v. Nat'l Oilwell Varco, Inc.*, 757 F.3d 416, 419 (5th Cir. 2014) ("Title 9 U.S.C. section 16(a)(1)(C) provides that a party may seek interlocutory review of an order . . . denying an application . . . to compel arbitration.") (internal quotation marks omitted).

[5] *Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 201 (5th Cir. 2016) (citing *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 205 (5th Cir. 2012)).

[6] *Kubala*, 830 F.3d at 201 (5th Cir. 2016).

[7] *Id.*

[8] *IQ Prods. Co. v. WD-40 Co.*, 871 F.3d 344, 348 (5th Cir. 2017).

is covered by the arbitration agreement."[9] Before this step, however, the court must answer a third question: "*[w]ho should have the primary power to decide*' whether the claim is arbitrable."[10] This question turns on "whether the agreement contains a valid delegation clause—'that is, if it evinces an intent to have the arbitrator decide whether a given claim must be arbitrated.' "[11]

This determination begins the two-step inquiry adopted in *Douglas v. Regions Bank*.[12] First, whether the parties "clearly and unmistakably" intended to delegate the question of arbitrability to an arbitrator.[13] If so, "the motion to compel arbitration should be granted in almost all cases."[14] But not "[i]f the argument that the claim at hand is within the scope of the arbitration agreement is 'wholly groundless.' "[15] So *Douglas*'s second step asks whether there is a plausible argument for the arbitrability

---

[9] *Kubala*, 830 F.3d at 201.

[10] *Id.* at 202 (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)).

[11] *IQ Prods.*, 871 F.3d at 348 (quoting *Kubala*, 830 F.3d at 202).

[12] 757 F.3d 460, 464 (5th Cir. 2014).

[13] "[C]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options*, 514 U.S. at 944 (citing *AT&T Technologies, Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)).

[14] *Kubala*, 830 F.3d at 202.

[15] *Douglas*, 757 F.3d at 464.

of the dispute. Where there is no such plausible argument, "the district court may decide the 'gateway' issue of arbitrability despite a valid delegation clause.' "[16]

The parties agree that the Dealer Agreement contained an arbitration provision, though not whether the arbitration provision applies here.[17] Specifically, they disagree on whether the court or an arbitrator should decide the gateway question of arbitrability—and relatedly, whether the underlying dispute is arbitrable at all. We turn to the two-step *Douglas* test.

A.

We first ask if the parties "clearly and unmistakably" delegated the issue of arbitrability.[18] Absent a delegation, "the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."[19] "Just as the arbitrability of the merits of a dispute depends upon

---

[16] *IQ Prods.*, 871 F.3d at 349.

[17] Archer states that, because the Dealer Agreement "unambiguously divides disputes into two categories"—those within the carve-out and all other disputes—there is no valid agreement to arbitrate. This argument misconstrues the very first analytical step in enforcement of an arbitration agreement, which asks "whether the parties entered into *any arbitration agreement at all*." Archer does not appear to argue that there was no arbitration agreement regarding claims outside the scope of the carve-out. Instead, Archer contends that the Dealer Agreement is "best construed to express the parties' intent not to arbitrate this action seeking injunctive relief." Thus, we treat Archer's arguments to this effect as going to whether the parties agreed to arbitrate this particular dispute.

[18] *AT&T*, 475 U.S. at 649, 1415.

[19] *Id.*

whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter.' "[20]

A contract need not contain an express delegation clause to meet this standard. An arbitration agreement that expressly incorporates the AAA Rules "presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."[21] Under AAA Rule 7(a), "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."[22]

By the Dealer Agreement, "[a]ny dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of [the predecessor]), shall be resolved by binding arbitration *in accordance with the arbitration rules of the American Ar-*

---

[20] *First Options*, 514 U.S. at 943 (internal citations omitted). *See also Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010) (holding that parties may delegate arbitrability through an express delegation clause).

[21] *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012).

[22] This version of Rule 7(a) was in effect when the parties signed their agreement. AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (2007), https://www.adr.org/sites/default/files/Commercial%20Arbitration%20Rules%20and%20Mediation%20Procedures%20Sept.%201%2C%202007.pdf.

bitration Association." The parties dispute the relationship between the carve-out clause—"except for actions seeking injunctive relief and [intellectual property] disputes"—and the incorporation of the AAA Rules.

The magistrate judge saw three separate parts to the arbitration provision: (1) a general rule compelling arbitration for any dispute related to the agreement, (2) an exemption from arbitration for actions seeking injunctive relief, and (3) a clause incorporating the AAA Rules.[23] On this reading, the AAA Rules would apply to all disputes arising under the contract, including those eventually found to fall within the Dealer Agreement's carve-out. The district court disagreed, holding that the carve-out clause removed the disputes from the ambit of both arbitration and the AAA Rules. The district court distinguished *Petrofac*, where the agreement at issue "did not contain any exclusions[;] [r]ather, it was a standard broad arbitration clause."[24]

Defendants argue that *Petrofac* controls; that, by holding otherwise, the district court conflated the issue of whether the dispute is arbitrable with the issue of who decides arbitrability; and that, under the plain language of the clause, disputes about arbitrability do not fall within the carve-out and thus belong to the arbitrator. This court has previously applied *Petrofac* to arbitration provisions containing carve-out provisions. In *Crawford*, we examined an agreement that incorporated the AAA Rules and preserved the parties' ability to seek injunctive relief in

---

[23] *Archer*, 2013 WL 12155243 at *1.

[24] *Archer*, 2016 WL 7157421, at *7.

the courts.[25] We held—without directly addressing the relevance of its carve-out provision—that the *Crawford* agreement's incorporation of the AAA Rules constituted "clear and unmistakable evidence that the parties to the [ ] Agreement agreed to arbitrate arbitrability, and so . . . whether the Plaintiffs' claims are subject to arbitration must be decided in the first instance by the arbitrator, not a court."[26]

Archer responds that the agreement in *Petrofac* did not include a carve-out provision, and the *Crawford*

---

[25] *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 256 (5th Cir. 2014). In that case, the Provider Agreement read, in relevant part:

> Any and all disputes in connection with or arising out of the Provider Agreement by the parties will be exclusively settled by arbitration before a single arbitrator in accordance with the Rules of the American Arbitration Association. The arbitrator must follow the rule of Law, and may only award remedies provided for in the Provider Agreement . . . . Arbitration shall be the exclusive and final remedy for any dispute between the parties in connection with or arising out of the Provider Agreement; provided, however, that nothing in this provision shall prevent either party from seeking injunctive relief for breach of this Provider Agreement in any state or federal court of law. . . .

Id.

[26] *Id.* at 263. Defendants also point to Oracle, where the Ninth Circuit addressed an arbitration clause that adopted the UNCITRAL Rules (which also delegate arbitrability issues to the arbitrator) and a carve-out for certain types of claims. The court rejected the argument that the carve-out provision bore on the question of arbitrability, stating that such an argument "conflates the scope of the arbitration clause . . . with the question of who decides arbitrability." *Oracle Am., Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1072–76 (9th Cir. 2013)

agreement is distinguishable because it contained separate clauses incorporating the AAA Rules and creating a carve-out excluding claims for injunctive relief—specifically, the agreement stated that the AAA Rules would apply to "[a]ny and all disputes in connection with or arising out of the Provider Agreement," and contained a carve-out in a subsequent sentence stating that nothing in the agreement would prevent a suit seeking injunctive relief in a court of law.[27]

Archer argues that, in contrast, the structure of the specific carve-out at issue here leads to the natural reading that the AAA Rules only apply to the category of cases that are subject to binding arbitration under the Dealer Agreement—namely, those outside of the contract's express carve-out. Archer further notes that Defendants' predecessor-in-interest drafted the Dealer Agreement, and that North Carolina law requires that "[p]ursuant to well [ ]settled contract law principles, the language of [an] arbitration clause should be strictly construed against the drafter of the clause."[28]

There is a strong argument that the Dealer Agreement's invocation of the AAA Rules does not apply to cases that fall within the carve-out. It is not the case that any mention in the parties' contract of the AAA Rules trumps all other contract language. Here, the interaction between the AAA Rules and the carve-out is at best ambiguous. On one reading, the Rules apply to "[a]ny dispute arising under or related to [the] Agreement." On another, the provision expressly exempts certain disputes and the

---

[27] *Crawford*, 748 F.3d at 256.

[28] *T.M.C.S., Inc. v. Marco Contractors, Inc.*, 780 S.E.2d 588, 597 (N.C. Ct. App. 2015).

Rules apply only to the remaining disputes. We need not decide which reading to adopt here because *Douglas* provides us with another avenue to resolve this issue: the "wholly groundless" inquiry.

B.

Regardless of whether an agreement clearly and unmistakably delegates the question of arbitrability, the second step in *Douglas* provides a narrow escape valve. If an "assertion of arbitrability [is] wholly groundless," the court need not submit the issue of arbitrability to the arbitrator.[29]

We have cautioned that the "wholly groundless" exception is a narrow one and that it "is not a license for the court to prejudge arbitrability disputes more properly left to the arbitrator pursuant to a valid delegation clause."[30] "An assertion of arbitrability is not 'wholly groundless' if 'there is a legitimate argument that th[e] arbitration clause covers the present dispute, and, on the other hand, that it does not.' "[31] If a court can find "a 'plausible' argument that the arbitration agreement requires the merits of the claim to be arbitrated," the wholly groundless exception will not apply.[32]

The magistrate judge issued his order before *Douglas*, and therefore he did not address the "wholly groundless"

---

[29] *Douglas*, 757 F.3d at 463 (quoting *Agere Systems, Inc. v. Samsung Elecs. Co.*, 560 F.3d 337, 340 (5th Cir. 2009)).

[30] *Kubala*, 830 F.3d at 202 n.1.

[31] *IQ Prods.*, 871 F.3d at 350 (quoting *Douglas*, 757 F.3d at 463).

[32] *Kubala*, 830 F.3d at 202 n.1.

exception directly. Instead, he found that while "[o]n the most superficial level, this lawsuit is clearly an action seeking injunctive relief since it *does* seek that relief," there was also "a plausible construction [of the Dealer Agreement] calling for arbitration."[33] Thus, he concluded that "the question of whether the exception for actions seeking injunctive relief should be limited to actions for an injunction in aid of arbitration or to enforce an arbitrator's award should properly be left for the arbitrator to decide."[34]

The district court, now with *Douglas* at hand, found the Defendants' arguments for arbitrability wholly groundless. The court first stated that the wholly groundless inquiry "necessarily requires the courts to examine and, to a limited extent, construe the underlying agreement."[35] It then noted that the Dealer Agreement's carve-out language "differs from the standard arbitration clause suggested by [AAA],"[36] and found that "the phrase 'except actions seeking injunctive relief' is clear on its face—any

---

[33] *Archer*, 2013 WL 12155243, at *1–2.

[34] *Id.* at *2.

[35] *Archer*, 2016 WL 7157421, at *8 (quoting *Douglas*, 757 F.3d at 463) (internal quotation marks omitted). This limited inquiry allows the parties to avoid jumping through hoops to begin arbitration only to be sent directly back to the courthouse. See *Douglas*, 757 F.3d at 464 ("When [plaintiff] signed the arbitration agreement containing a delegation provision, did she intend to go through the rigmaroles of arbitration just so the arbitrator can tell her in the first instance that her claim has nothing whatsoever to do with her arbitration agreement, and she should now feel free to file in federal court? Obviously not.").

[36] The district court claimed that "[s]uch an intentional drafting effort" deserves notice. *Archer*, 2016 WL 7157421.

action seeking injunctive relief is excluded from mandatory arbitration."[37] Thus, the provision's plain language includes all actions seeking injunctive relief, not a more limited category of cases. The court declined to "re-write the terms of the Parties' agreement to accommodate a party—notably the party that drafted the agreement—that could have negotiated for more precise language,"[38] and held that the arguments for arbitrability were "wholly without merit based on the plain language of the arbitration clause itself" and fell squarely within the *Douglas* exception.[39]

Defendants suggest a limited reading of the "wholly groundless" exception that would only apply when the contract containing the arbitration provision has "nothing to do with" the dispute before the court.[40] In *Douglas*, the plaintiff had signed an agreement with an arbitration provision when she opened a checking account with Regions Bank that closed less than one year later. Years later, the plaintiff was involved in an automobile accident,

---

[37] *Id.*

[38] *Id.* at *6.

[39] *Archer*, 2016 WL 7157421, at *9. The district court also rejected arguments from Defendants that Archer failed to "plead" a claim for injunctive relief based on the fact that Archer had not made any showing on the factors articulated by the Supreme Court in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006). The court held first that the *eBay* factors are not pleading requirements, and that in any event, the proper vehicle to argue the plaintiff is not entitled to relief would be a motion to dismiss under Rule 12. We do not address the underlying merits of Archer's claim here because, as Defendants concede, "the issue here is not whether Archer's injunctive relief claim fails on the merits."

[40] *Douglas*, 757 F.3d at 461.

and she received a $500,000 settlement in subsequent litigation. She then alleged that her attorney, who banked with Regions, had embezzled that money, and she brought suit against the bank for negligence and conversion on the theory that the bank had notice of the embezzlement and failed to report it. Regions moved to compel arbitration pursuant to the agreement that the plaintiff signed when she opened the now-closed checking account. This court held that "[t]he mere existence of a delegation provision in the checking account's arbitration agreement . . . cannot possibly bind [the plaintiff] to arbitrate gateway questions of arbitrability in *all* future disputes with the other party, no matter their origin."[41]

Defendants argue that applying the "wholly groundless" exception here would allow the court to construe the bounds of an arbitration clause before an arbitrator can do so—effectively obviating the entire purpose of delegating the gateway question to the arbitrator in the first place; that their arbitrability arguments are not wholly groundless, pointing to the magistrate judge's finding of plausible readings of the arbitration clause that would not exclude the suit from arbitration; and that doubts about the arbitrability of a claim should be resolved in favor of arbitration, pursuant to settled federal law.

Defendants urge that "[t]he correct reading of this arbitration clause is that the parties may come to court seeking injunctive relief at any time . . . but still must arbitrate any claim for damages." Defendants further urge the court should send the damages clause to arbitration, even if it results in "piecemeal litigation." In their view, "[t]he

---

[41] *Id.* at 462, 464.

correct reading of this arbitration clause is that the parties may come to court seeking injunctive relief at any time . . . but still must arbitrate any claim for damages."

Archer counters that the plain language of the clause makes clear that the parties did not agree to arbitrate *actions* that involve a request for injunctive relief, and that any argument to the contrary is wholly groundless. Archer emphasizes that arbitration agreements are "as enforceable as other contracts, but not more so,"[42] and states that under North Carolina law, "when the terms of a contract are plain and unambiguous, there is no room for construction. The contract is to be interpreted as written and enforced as the parties have made it."[43] Archer says the Dealer Agreement clearly contemplates two categories of disputes—those involving "actions seeking injunctive relief" and certain intellectual property disputes, and all other disputes—and that only the latter category must be subject to arbitration. Archer contends that the clause's incorporation of "action" prohibits any piecemeal litigation because "action," as distinct from "claim," pertains to all of the claims in a given case.[44]

While *Douglas* is a recent case, with contours of the "wholly groundless" exception not yet fully developed, if the doctrine is to have any teeth, it must apply where, as here, an arbitration clause expressly excludes certain

---

[42] See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12, 87 (1967).

[43] *State v. Philip Morris USA Inc.*, 363 N.C. 623, 685 (2009) (internal quotation marks omitted) (internal citations omitted).

[44] An action is "[a] civil or criminal judicial proceeding," which is "nearly if not quite synonymous" with suit. BLACK'S LAW DICTIONARY 28–29 (7th ed. 1999).

types of disputes. The arbitration clause creates a carve-out for "actions seeking injunctive relief." It does not limit the exclusion to "actions seeking *only* injunctive relief," nor "actions for injunction in aid of an arbitrator's award." Nor does it limit itself to only *claims* for injunctive relief. Such readings find no footing within the four corners of the contract. "When the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of construction, cannot reject what the parties inserted or insert what the parties elected to omit."[45] We see no plausible argument that the arbitration clause applies here to an "action seeking injunctive relief." The mere fact that the arbitration clause allows Archer to avoid arbitration by adding a claim for injunctive relief does not change the clause's plain meaning. "While ambiguities in the language of the agreement should be resolved in favor of arbitration, we do not override the clear intent of the parties, *or reach a result inconsistent with the plain text of the contract*, simply because the policy favoring arbitration is implicated."[46]

III.

Defendants argue in the alternative that, even if the district court was correct to decide the issue of arbitrability, it erred in determining that the complaint was not subject to the arbitration clause. Because we find that Defendants' arguments for arbitrability are wholly groundless, we affirm the district court's holding that the

---

[45] *Procar II, Inc. v. Dennis*, 721 S.E.2d 369, 371 (N.C. Ct. App. 2012).

[46] *E.E.O.C. v. Waffle House*, 534 U.S. 279, 294 (2002) (emphasis added).

claims are not arbitrable. Having concluded that this action is not subject to mandatory arbitration, we need not reach the question of whether the third parties to the arbitration clause in this case can enforce such an arbitration clause.

We affirm the district court's order denying the motions to compel arbitration.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

ARCHER AND WHITE SALES, INC.,
Plaintiff,

v.

HENRY SCHEIN, INC. ET AL.,
Defendants.

Civil Action No. 2:12-cv-572-JRG

MEMORANDUM OPINION AND ORDER

Before the Court is Plaintiff's Motion for Reconsideration (Dkt. No. 45) of the Magistrate Judge's Memorandum Order (Dkt. No. 44). Having fully considered the briefing and the Parties' arguments at the hearing on November 9, 2016, the Court finds that Plaintiff's Motion should be and hereby is **GRANTED.**

I. BACKGROUND

a. Factual Background

According to the Complaint, Plaintiff Archer and White Sales ("Plaintiff") is a distributor of dental equipment that competes directly against Defendant Henry Schein, Inc. ("Schein") and Company X

(not named as a defendant in this action). Plaintiff is allegedly known nationally among dental professionals for its low prices and high-quality service. (Compl. at 7.) Schein is alleged to be the largest distributor of dental equipment in the United States. (Compl. at 5.) Defendant Danaher Corporation ("Danaher") is allegedly the largest manufacturer of dental equipment in the United States. (Compl. at 4.) The remaining defendants—Instrumentarium, Dental Equipment LLC d/b/a Pelton & Crane, Dental Equipment LLC d/b/a DCI Equipment, KaVo, and Gendex—are alleged to be wholly-owned subsidiaries of Danaher, which were acquired by Danaher since 2004. (Compl. at 4-7.) Danaher and these subsidiaries are sometimes referred to herein as the "Manufacturer Defendants."

Plaintiff alleges that Schein and Company X have conspired to fix prices and to refuse to compete with each other in the sale of dental equipment to dental professionals. (Compl. at 1–2.) Moreover, Plaintiff alleges that Schein and Company X have conspired with the Manufacturer Defendants to terminate and/or reduce Plaintiff's distribution territory in response to Plaintiff's low prices. (Compl. at 2.) Plaintiff claims that this termination constitutes an illegal boycott, orchestrated by the Defendants to perpetuate the price-fixing agreement and the agreement not to compete between Schein and Company X. (Compl. at 2.) Plaintiff further claims that Danaher, as the common supplier to all three horizontal competitors, knowingly participated in this illegal boycott. (Compl. at 2.)

b. Procedural Background

On August 31, 2012, Plaintiff filed suit against Defendant Schein and the Manufacturer Defendants

alleging violations of Section 1 of the Sherman Act, violations of Section 16 of the Clayton Act, and violations of the Texas Free Enterprise and Antitrust Act. Soon after, on September 26, 2012, the Manufacturer Defendants filed a Motion to Compel Arbitration and Stay All Proceedings (Dkt. No. 10). A few days later, Defendant Schein also filed a Motion to Compel Plaintiff to Arbitrate and to Stay Proceedings (Dkt. No. 14). After holding a hearing on these the Motions, the Magistrate Judge on May 28, 2013, issued an Order granting both Motions, staying the action pending arbitration of the asserted claims, and directing the Parties to notify the Court upon completion or abandonment of the arbitration process (Dkt. No. 44)

On June 10, 2013, Plaintiff filed this Motion for Reconsideration of the Magistrate Judge's Order (Dkt. No. 45). Although Plaintiff styled its filing as a "Motion for Reconsideration," the first sentence of the Motion reads: "Plaintiff Archer and White Sales, Inc. ('Archer') objects to and moves for reconsideration of the May 28, 2013, Memorandum Order." (Dkt. No. 45 at 1.) As such, it was unclear whether Plaintiff intended to have the Magistrate Judge reconsider his Order or whether Plaintiff intended to file objections to the Order under Rule 72(a). Having reviewed the Motion in full, and noting that Plaintiff filed its Motion within fourteen days of the Magistrate Judge's Order, the Court finds that Plaintiff intended its Motion to be considered as objections to the Magistrate Judge's Order, rather than as a Motion for the Magistrate Judge to reconsider that Order. The Court now reviews the Motion accordingly.

II. STANDARD OF REVIEW

A party may file objections to a magistrate judge's order regarding a nondispositive matter within fourteen days of the order. Fed. R. Civ. Pro. 72(a).[1] A district judge may modify or set aside any part of the order that is clearly erroneous or contrary to law. *Id.*

III. LEGAL STANDARD

Under the Federal Arbitration Act ("FAA"), an arbitration agreement that involves interstate commerce is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2012). Section 3 of the FAA requires courts to stay court proceedings pending arbitration for any issue covered by an arbitration

---

[1] The Fifth Circuit has yet to determine the appropriate standard for reviewing a magistrate judge's ruling on motions to compel arbitration. *Lee v. Plantation of Louisiana, L.L.C.*, 454 F. App'x 358, 360 (5th Cir. 2011) ("[W]e need not reach the question of whether a motion to compel arbitration is a dispositive or non-dispositive motion for purposes of the standard of review by the district judge of the magistrate judge's order.") Other courts, however, have concluded that a ruling on a motion to compel arbitration is a non-dispositive ruling. *See PowerShare, Inc. v. Syntel, Inc.*, 597 F.3d 10, 13–15 (1st Cir. 2010); *Virgin Islands Water & Power Auth. v. Gen. Elec. Int'l Inc.*, 561 F. App'x 131, 134–35 (3d Cir. 2014); *Tige Boats, Inc. v. Interplastic Corp.*, No. 1:15-CV-0114-P-BL, 2015 WL 9268423, at *1–3 (N.D. Tex. Dec. 21, 2015) (holding that the magistrate judge's ruling compelling arbitration was non-dispositive where the ruling stayed the case rather than dismissing the case pending arbitration). Moreover, when "review of a non-dispositive motion by a district judge turns on a pure question of law, that review is plenary under the 'contrary to law' branch of the Rule 72(a) standard," and thus "there is no practical difference between review under Rule 72(a)'s 'contrary to law' standard and review under Rule 72(b)'s de novo standard." *PowerShare*, 597 F.3d at 15.

agreement. 9 U.S.C. § 3. *See also Hornbeck Offshore Corp. v. Coastal Carriers Corp.*, 981 F.2d 752, 754 (5th Cir. 1993).

At a high level, courts perform a two-step inquiry to determine whether to compel a party to arbitrate. *Dealer Computer Servs. v. Old Colony Motors, Inc.*, 588 F.3d 884, 886 (5th Cir. 2009). First, a court must determine whether the parties agreed to arbitrate the particular dispute at issue. *Id. See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). If so, the court must next determine whether any applicable federal statute or policy renders the claims nonarbitrable. *Dealer Computer Servs.*, 588 F.3d at 886. In other words, the court must determine "whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims." *Mitsubishi Motors*, 473 U.S. at 628. With respect to the first inquiry, there are two separate considerations: whether a valid agreement to arbitrate *some* claims exists (contract formation) and whether the dispute at hand falls within the terms of that valid agreement (contract interpretation). *Dealer Computer Servs.*, 588 F.3d at 886. In this case, the Parties do not dispute that a valid agreement to arbitrate *some* set of claims exists. However, the Parties dispute whether that agreement covers the Plaintiff's claims in this case.

"Arbitration is a matter of contract between the parties, and a court cannot compel a party to arbitrate unless the court determines the parties agreed to arbitrate the dispute in question." *Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1064 (5th Cir. 1998). The FAA "does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding

certain claims from the scope of their arbitration agreement." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (internal citation omitted).

a. The Question of Arbitrability

Although in most circumstances the Supreme Court has recognized a liberal policy in favor of arbitration, the Court has "made clear that there is an exception to this policy: The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.' " *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (first quoting *AT&T Technologies*, 475 U.S. at 649 (emphasis added); then quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). Although the Court's definition of "question of arbitrability" is narrow, it includes "a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *Howsam*, 537 U.S. at 84 (citing *AT&T Technologies*, 475 U.S. at 651-52).

The Court has also explained that "[j]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *First Options*, 514 U.S. at 943 (internal citations omitted). As to questions of arbitrability, the Court applies a "strong pro-court presumption as to the parties' likely intent." *Howsam*, 537 U.S. at 86. *See also Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068

n.2 (2013) (noting that questions of arbitrability are "presumptively for courts to decide"); *Houston Ref., L.P. v. United Steel, Paper & Forestry, Rubber, Mfg.*, 765 F.3d 396, 408 (5th Cir. 2014) ("[T]he law presumes that courts have plenary power to decide the gateway question of a dispute's 'arbitrability'—*i.e.*, 'whether [the parties] agreed to arbitrate the merits.' ") (quoting *First Options*, 514 U.S. at 942). Thus, the Court has held that "[u]nless the parties *clearly and unmistakably* provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Howsam*, 537 U.S. at 86. *See also First Options*, 514 U.S. at 944 ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so.") (quoting *AT&T Technologies*, 475 U.S. at 649).

IV. ANALYSIS

The arbitration clause at issue in this case is found in a Dealer Agreement between Pelton & Crane[2] and Archer and White Sales, dated October 4, 2007, which established Archer and White Sales as a distributor of Pelton & Crane products. (Dkt. No. 46-1, Ex. C.) The arbitration clause states:

> Disputes. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for

---

[2] The same arbitration clause is found in Addendum 2 to the Marus Dealer Agreement (with the name "Marus Dental" substituted for "Pelton & Crane") (Dkt. No. 46-1, Ex. D) and Addendum 2 to the DCI Equipment Dealer Agreement (with the name "DCI Equipment" substituted for "Pelton & Crane") (Dkt. No. 46-1, Ex. E).

> actions seeking injunctive relief and disputes related to trademarks, trade secrets or other intellectual property of Pelton & Crane) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association. The place of arbitration shall be in Charlotte, North Carolina.

Here, the Parties dispute whether they agreed to arbitrate antitrust claims. Additionally, the Parties disagree as to who should make that determination—the arbitrator or this Court.

Plaintiff argues that this action is unambiguously excluded from the arbitration clause because the clause expressly excludes "actions seeking injunctive relief"—and it is not disputed that Plaintiff seeks injunctive relief. (Dkt. No. 45, at 3-9.) Defendant responds by contending that a claim for injunctive relief can be added to most lawsuits, and Plaintiff should not be able to evade arbitration by merely asking for injunctive relief in addition to Plaintiff's claim for damages. (Dkt. No. 46, at 7.) According to Plaintiff, however, the fact that a plaintiff may put forth a claim for damages in addition to a claim for injunctive relief is simply irrelevant, and the Court must give the contract its plain and unambiguous meaning. (Dkt. No. 45, at 4.) As such, Plaintiff objects to the Magistrate Judge's ruling on the grounds that it is contrary to the plain language of the arbitration clause. (Dkt. No. 45, at 4.) Further, both sets of Defendants argue that the Magistrate Judge correctly held that the question of arbitrability should be determined by the arbitrator rather than this Court.

c. Scope of Arbitration Clause

"[A] valid agreement to arbitrate applies 'unless it can be said with positive assurance that [the] arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.'" *Pers. Sec. & Safety Sys. Inc. v. Motorola Inc.*, 297 F.3d 388, 392 (5th Cir. 2002) (quoting *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir. 1990)). However, to determine the scope of an arbitration agreement, "we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). As such, "[w]hile ambiguities in the language of the agreement should be resolved in favor of arbitration, we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *Waffle House*, 534 U.S. at 294 (internal citation omitted). The FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Info. Scis., Inc.*, 489 U.S. at 478.

The Manufacturer Defendants argue that the only "sensible" construction of the arbitration clause would require arbitration of the present action. (Dkt. No. 46, at 6.) Specifically, the Manufacturer Defendants argue that this dispute is "related to" the parties' agreement because the rights Plaintiff seeks to vindicate were created by the Dealer Agreement. (Dkt. No. 46, at 6.) As to the express exclusion of actions seeking injunctive relief, the Manufacturer Defendants argue that Plaintiff's interpretation of the clause would significantly weaken the arbitration clause and thus cannot be correct. (Dkt. No. 46, at 7.) According to the Manufacturer Defendants,

a party's "mere inclusion of a boilerplate request for injunctive relief in a complaint otherwise seeking a jury trial for a damages claim" would suffice to remove an action from arbitration. (Dkt. No. 46, at 7.) As such, the Manufacturer Defendants propose another interpretation of that express exclusion: that the exclusion is intended to "allow[ ] a party to seek injunctive relief in court, particularly where the issue in dispute involves 'trademarks, trade secrets or other intellectual property,' or to seek an injunction in aid of arbitration or to enforce an arbitrator's award." (Dkt. No. 46, at 7.) However, these Defendants fail to provide any substantive basis for reading into the Parties' agreement such significant limitations.

Defendant Schein adopts the Manufacturer Defendants' arguments. (Dkt. No. 47, at 13.) Schein also argues that Plaintiff's complaint fails to allege facts to support a claim for injunctive relief. (Dkt. No. 47, at 13.) Specifically, Schein lists the four *eBay* factors and argues that Plaintiff failed to plead the "elements" of a claim for a preliminary or permanent injunction. (Dkt. No. 47, at 13–14.) The Court will address each of the Defendants' arguments in turn.

First, the Court need not affirmatively decide whether the present action falls within the clause which indicates that any disputes "related to" the agreement must be arbitrated, as the ultimate question turns on the clause's express exclusion, which excludes from arbitration "actions seeking injunctive relief."

Second, the phrase "except actions seeking injunctive relief" is clear on its face—any action seeking injunctive relief is excluded from mandatory arbitration. Plaintiff's action seeks injunctive relief. Applying the plain meaning

of the clause, Plaintiff's action is excluded from mandatory arbitration.

As Plaintiff noted in its Response to the Manufacturer Defendants' Motion to Compel, the arbitration clause in the Dealer Agreement differs from the standard arbitration clause suggested by the American Arbitration Association ("AAA"). (Dkt. No. 21, at 6 (citing Dkt. No. 10-3, Ex. B).) Specifically, the clause's exclusion of actions seeking injunctive relief (and trademark disputes) is not part of the AAA's suggested language. The arbitration clause in this case is unique. Such an intentional drafting effort as opposed to dropping in standard language is worthy of the Court's notice.

Third, the Manufacturer Defendants' proposed interpretation of the exclusion clause fails based on the plain language of the clause itself. Those Defendants argue that the exclusion covers only intellectual property disputes or actions seeking injunctions in aid of arbitration. However, no textual basis exists for reading the phrase "actions seeking injunctive relief" as "actions seeking injunctive relief if such injunctions are in aid of arbitration." Further, the clause does not limit the exclusion to actions seeking "only" injunctive relief, and the Court also declines to read that limitation into the document.

A very similar clause was recently addressed by the Southern District of New York in *Frydman v. Diamond*, No. 1:14-CV-8741-GHW, 2015 WL 5294790 (S.D.N.Y. Sept. 10, 2015). The clause that excluded actions from arbitration in that case stated:

> Should any dispute arise between the Parties which gives rise to injunctive or

> equitable relief pursuant to the terms of this Agreement, the Operating Agreements or the Settlement Agreements, then notwithstanding anything else contained in such agreements, ***the party initiating an action seeking injunctive or equitable relief may at his/her/its election bring such action in a court of competent jurisdiction***, and each of the other Parties hereby consent to same and shall not seek to dismiss or move such action to arbitration or other adjudication. *Id.* at *2 (emphasis added).

The parties' arguments in that case mirror the arguments presented to this Court. There, the plaintiff argued that the exception allowed the plaintiff to choose the forum in which to bring any action seeking injunctive relief. *Id.* at *2. Meanwhile, the defendants argued that the clause "was intended to be a narrow exception to the parties' broad agreement to arbitrate, and that the plaintiff's interpretation of [the clause] would render the parties' agreement to arbitrate meaningless because any party could avoid arbitration by simply including any type of claim of injunctive or equitable relief in his complaint." *Id.* at *6. There the defendants also argued that the exclusion should be interpreted as "a standard 'aid of arbitration' provision of the sort that allows a party to an arbitration agreement to seek equitable or injunctive relief either to enforce an arbitral award or to maintain the status quo pending arbitration." *Id.* at *6. The court in that case held that the plain language excluded the plaintiff's action from arbitration because the plaintiff's action sought equitable relief. In reaching the same conclusion, this Court finds persuasive the *Frydman*

Court's emphasis on the plain language chosen and agreed to by the parties.[3]

The Manufacturer Defendants' argument that this reading of the clause would substantially weaken the arbitration clause simply cannot override the plain meaning of the words chosen by the parties in their agreement. To put it concisely, the Court will not re-write the terms of the Parties' agreement to accommodate a party—notably, the party that drafted the agreement[4]—that could have negotiated for more precise language. It is the duty of the courts to "enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Info. Scis., Inc.*, 489 U.S. at 478. *See also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (noting that the purpose of the Federal Arbitration Act was "to make arbitration agreements as enforceable as other contracts, *but not more so*") (emphasis added).

---

[3] Although the court in *Frydman* relied on New York state law principles of contract interpretation to underscore the supremacy of the plain language, North Carolina law places the same emphasis on the plain meaning of words in contract interpretation. Under North Carolina law, "when the terms of a contract 'are plain and unambiguous, there is no room for construction. The contract is to be interpreted as written,' . . . and 'enforce[d] . . . as the parties have made it.' " *State v. Philip Morris USA Inc.*, 363 N.C. 623, 632, 685 S.E.2d 85, 91 (2009) (first quoting *Jones v. Casstevens*, 222 N.C. 411, 413, 23 S.E.2d 303, 305 (1942); then quoting *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970)) (internal citations omitted).

[4] As Plaintiff noted in its Sur-reply to the Manufacturer Defendants' Motion to Compel, the clause at issue was drafted by Pelton & Crane. (Dkt. No. 33, at 2.)

Finally, Defendant Schein's argument that Plaintiff failed to "plead" a claim for injunctive relief also fails. First, any argument that Plaintiff failed to state a claim for relief should be raised under Federal Rule of Civil Procedure 12. There is no such motion before the Court. Further, the factors articulated by the Supreme Court in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006), are not pleading requirements—rather, they are factors that are to be considered and carefully weighed by a court before an injunction should issue. To put it simply, injunctive relief is a remedy, not a cause of action. *See Prompt Med. Sys., L.P. v. Allscriptsmisys Healthcare Sols., Inc.*, No. 6:10-CV-71, 2011 WL 12863577, at *1 (E.D. Tex. Feb. 11, 2011) (noting that the defendants in that case failed to provide any authority that an injunction must be pleaded with more specific facts). *See also AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986) ("[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims.").

Given the plain meaning of the language chosen by the Parties, and there being no basis for reading significant limitations into the express exclusion, the Court concludes that there is, in this case, a "positive assurance" that no reasonable interpretation of the arbitration clause would force this action into arbitration. *See Pers. Sec. & Safety Sys.*, 297 F.3d at 392 ("[A] valid agreement to arbitrate applies 'unless it can be said with positive assurance that [the] arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.' ") (quoting *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir. 1990)).

b. The Question of Arbitrability

The Parties disagree as to who should determine the scope of the arbitration clause in this case—the arbitrator or this Court. A general presumption exists in favor of arbitrability being decided by the Court, as "the law presumes that courts have plenary power to decide the gateway question of a dispute's 'arbitrability'—*i.e.*, 'whether [the parties] agreed to arbitrate the merits.' " *Houston Ref., L.P. v. United Steel, Paper & Forestry, Rubber, Mfg.*, 765 F.3d 396, 408 (5th Cir. 2014) (quoting *First Options*, 514 U.S. at 942). Thus, the Court concludes that the question of arbitrability should not be sent to the arbitrator in these narrow circumstances for two reasons: (1) the Parties did not clearly and unmistakably agree to arbitrate the arbitrability of actions seeking injunctive relief; and (2) Defendants' argument that Plaintiff's claims fall within the scope of the arbitration clause is wholly groundless. The Court will address these two independent rationales in turn

i. Clear and Unmistakable Evidence

Courts often find clear and unmistakable evidence of an agreement to arbitrate arbitrability when an agreement includes an express delegation provision. *See, e.g.*, *Aviles v. Russell Stover Candies, Inc.*, 559 F. App'x 413, 415 (5th Cir. 2014) (holding that the delegation clause provided clear and unmistakable evidence that the parties intended to arbitrate arbitrability). "A delegation provision is an 'agree[ment] to arbitrate "gateway" questions of "arbitrability," such as . . . whether [the parties'] agreement covers a particular controversy.'" *Douglas v. Regions Bank*, 757 F.3d 460, 462 (5th Cir. 2014). There is no *express* delegation clause in the

agreement before this Court. Nonetheless, as Schein and the Manufacturer Defendants correctly note, the Fifth Circuit has held that the adoption of the AAA rules to govern arbitration proceedings "presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Cooper v. WestEnd Capital Mgmt., L.L.C.*, 832 F.3d 534, 546 (5th Cir. 2016) (quoting *Petrofac, Inc. v. DynMcDermott Petroleum Operations, Co.*, 687 F.3d 671, 675 (5th Cir. 2012)). As such, Defendants rely on *Petrofac* to argue that the Magistrate Judge correctly decided to refer the case to an arbitrator to determine arbitrability based on the Parties incorporation of the AAA rules. (Dkt. No. 46, at 1; Dkt. No. 47, at 13.)

As Plaintiff noted during its oral argument, the arbitration clause in *Petrofac* did not contain any exclusions. Rather, it was a standard broad arbitration clause. Plaintiff also argues that unlike the arbitration clause in *Petrofac*, the arbitration clause here "cabins application of the AAA rules to disputes 'arising under or related to' the Agreement that are *not* 'actions seeking injunctive relief' or 'disputes relating to trademarks, trade secrets or other intellectual property of Pelton & Crane.' " (Dkt. No. 48, at 1 (emphasis added).) In other words, according to Plaintiff, the clause represents an agreement that the AAA rules would govern only when the dispute did *not* fall within the expressly excluded categories. This Court finds such argument to have merit.

Although Plaintiff's argument at first blush appears circular, the logic of Plaintiff's argument holds true given the exclusion expressly set forth by the Parties. For example, if the present action fell *outside* of the clause's express exclusion, any questions as to arbitrability (*e.g.*,

whether a particular cause of action "arises out of or relates to" the agreement) would be sent promptly to the arbitrator. That is not the case here, where the present action falls squarely within the terms of an express carve-out. Indeed, it would be senseless to have the AAA rules apply to proceedings that are not subject to arbitration. As such, there is no reason to believe that incorporation of the AAA rules, including the AAA rule that delegates the question of arbitrability to the arbitrator, should indicate a clear and unmistakable intention that the parties agreed to arbitrate the question of arbitrability in these circumstances—when an action falls squarely within the clause excluding actions like this from arbitration. *See James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 81 (Del. 2006) (addressing a broad arbitration clause that contained a clause allowing injunctive relief to be pursued in court and holding that "[s]ince this arbitration clause does not generally refer *all* controversies to arbitration, the federal majority rule does not apply, and something other than the incorporation of the AAA rules would be needed to establish that the parties intended to submit arbitrability questions to an arbitrator") (emphasis added).

ii. The "Wholly Groundless" Exception

Even if this Court were to find that the adoption of the AAA rules constituted clear and unmistakable evidence that the Parties agreed to arbitrate the question of arbitrability in these unique circumstances, recent guidance from the Fifth Circuit indicates that in narrow circumstances, a court should nonetheless determine arbitrability where a defendant's argument in favor of arbitrability is "wholly groundless." *Douglas*, 757 F.3d at 463–64. In *Douglas*, the Fifth Circuit addressed whether

the question of arbitrability should be sent to the arbitrator. *Id.* at 462. The arbitration clause at issue in that case defined the "disputes" that would be subject to arbitration as including "the validity, enforceability, or scope of this Arbitration provision." *Id.* at 462. Despite the existence of an express delegation clause in the arbitration agreement (which does not exist here), the Fifth Circuit held that the question of arbitrability need not be sent to arbitration. *Id.* at 462–63.

The Circuit held that "[t]he law of this circuit does not require all claims to be sent to gateway arbitration merely because there is a delegation provision." *Id.* at 463. In its analysis, the Fifth Circuit relied on a test established by the Federal Circuit, a test that "most accurately reflects the law—that what must be arbitrated is a matter of the parties' intent." *Id.* at 464.[5] The Federal Circuit's test involves two steps: "(1) did the parties 'unmistakably intend to delegate the power to decide arbitrability to an arbitrator,' and if so, (2) is the assertion of arbitrability 'wholly groundless.' " *Agere Sys., Inc. v. Samsung Elecs. Co.*, 560 F.3d 337, 340 (5th Cir. 2009) (quoting *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1371 (Fed. Cir. 2006)). As applied, "the 'wholly groundless' inquiry 'necessarily requires the courts to examine and, to a limited extent, construe the underlying agreement.' "

---

[5] Though cited with approval, it is unclear whether the Fifth Circuit has expressly adopted the Federal Circuit's "wholly groundless" test. Regardless, even if that test has not been adopted by the Fifth Circuit, as discussed in Section IV.b.i above the Court finds that there is not clear and unmistakable evidence that the Parties intended to send the question of arbitrability to an arbitrator because the adoption of the AAA rules in this case applies only to matters subject to arbitration—not to those that are expressly excluded from arbitration.

Douglas, 757 F.3d at 463 (quoting *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n*, 718 F.3d 1336, 1346–47 (Fed. Cir. 2013), vacated on other grounds, 134 S.Ct. 1876 (2014) (vacating on mootness grounds)).

In so holding, the Fifth Circuit emphasized that to hold otherwise would require the plaintiff to go to an arbitrator merely to have the arbitrator "flatly" explain that the claim did not fall within the scope of the agreement and promptly send plaintiff back to court. *Douglas*, 757 F.3d at 463. The Circuit noted the absurdity of such a process:

> When [plaintiff] signed the arbitration agreement containing a delegation provision, did she intend to go through the rigmaroles of arbitration just so the arbitrator can tell her in the first instance that her claim has nothing whatsoever to do with her arbitration agreement, and she should now feel free to file in federal court? Obviously not. *Id.* at 464.

The same unequivocal response from the arbitrator would just as readily occur here, where the plain language of the clause carves out and excludes the action brought by this Plaintiff. As discussed above in Section IV.a, Defendants' argument that this action seeking injunctive relief should be referred to arbitration is wholly without merit based on the plain language of the arbitration clause itself. As a result, the Court finds that even if the inclusion of the AAA rules for disputes not carved out by the Parties' own language is held to be clear and unmistakable evidence that the parties generally agreed to arbitrate the question of arbitrability, Defendants' assertion that this

particular action should be arbitrated is "wholly groundless." Additionally, given the clarity of the arbitration provision discussed above, it would be senseless to refer the issue of arbitrability to the arbitrator, only to have the arbitrator read the plain language of the clause and then send the Parties back to this Court.

The Court recognizes that the "wholly groundless" exception in *Douglas* should be used only in "exceptional" circumstances, and the Court does not seek to expand that narrow exception by applying it in this case. *See Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 202 n.1 (5th Cir. 2016) ("Such cases are exceptional, and the rule in *Douglas* is not a license for the court to prejudge arbitrability disputes more properly left to the arbitrator pursuant to a valid delegation clause. So long as there is a 'plausible' argument that the arbitration agreement requires the merits of the claim to be arbitrated, a delegation clause is effective to divest the court of its ordinary power to decide arbitrability."). However, given the precise facts of this case—that there is no express delegation of arbitrability, but simply the adoption of the AAA rules for disputes not excluded from arbitration—and given that the plain meaning of the language at issue leaves Schein and the Manufacturer Defendants with no plausible argument that this action falls within the narrowed parameters of those disputes subject to arbitration, application of the *Douglas* exception is appropriate in this particular case.

c. Equitable Estoppel

Having concluded that this action falls within the express exclusion contained in the parties' arbitration clause and that this action is not subject to mandatory arbitration, the Court need not decide, and does not reach, the

question of whether the third parties to the arbitration clause in this case can enforce such arbitration clause.

V. CONCLUSION

For the foregoing reasons, the Magistrate Judge's Order should be and hereby is **REVERSED**. It is therefore **ORDERED** that the Magistrate Judge's Order (Dkt. No. 44) is hereby **VACATED**. Accordingly, the Motions to Compel Arbitration filed by Defendant Schein and the Manufacturer Defendants are **DENIED**, and the stay previously entered in this case is hereby **LIFTED**.

The trial date for this action is hereby set for February 5, 2018, and the pre-trial hearing date is set for January 8, 2018. Accordingly, the Parties are **ORDERED** to meet and confer and thereafter jointly submit a proposed Docket Control Order to the Court within 14 days of this Order based on the above trial and pre-trial dates.

So **ORDERED** and **SIGNED** this 7th day of December, 2016.

/s/ Rodney Gilstrap
Rodney Gilstrap
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

ARCHER AND WHITE SALES, INC.

v.

HENRY SCHEIN, INC., et al.

Case No. 2:12-CV-572-JRG-RSP

05/28/2013

MEMORANDUM ORDER

ROY S. PAYNE, United States Magistrate Judge.

Currently before the Court are the two motions to compel arbitration, filed by Defendant Henry Schein, Inc. (Dkt. No. 14) and by Defendants Danaher Corporation, Dental Equipment LLC, Dental Imaging Technologies Corporation, Instrumentarium Dental Inc., and KaVo Dental Technologies, LLC (hereinafter "the Manufacturer Defendants") (Dkt. No. 10). For the reasons that follow, the motions are **GRANTED**.

Plaintiff ("Archer") is a distributor of dental equipment and competes directly against Defendant Henry

Schein, Inc. ("Schein"), which is alleged to be the biggest distributor in the country. Defendant Danaher Corporation ("Danaher"), which is alleged to be the biggest manufacturer of dental equipment, has over the last decade acquired all of the other named defendants, formerly its smaller competitors in the dental equipment manufacturing field. Archer alleges that Schein conspired with Danaher and its subsidiaries, and one unnamed large distributor, to restrict Archer's access to the market because Archer was attempting to sell the equipment to dentists at discounted prices. In these motions, the Defendants assert that Archer is bound by arbitration clauses in its distributor agreements with some of the Manufacturer Defendants. Defendants also assert that the doctrine of equitable estoppel allows even the Defendants who are not parties to any contract with Archer containing an arbitration clause to demand arbitration.

The starting point for this case is the arbitration clause itself. However, it must be read against the background of the strong public policy in favor of arbitration expressed in the Federal Arbitration Act. 9 U.S.C. § 1, et seq. The clause provides: "Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes relating to trademarks, trade secrets or other intellectual property of Pelton & Crane[1]) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association." Three parts of this clause bear upon the outcome of the dispute. First, the opening clause is a broad one, referring as it does to *any* dispute *related* to the agreement. Second, that broad clause has an exception for

---

[1] Pelton & Crane was the predecessor of one of the Danaher subsidiaries.

actions seeking injunctive relief. Third, the clause incorporates the rules of the AAA.

The Court has no hesitation in concluding that this lawsuit is a dispute "related" to the distributor agreement. After all, the very rights that Archer claims the Defendants conspired to defeat were created by the distributor agreement and others like it that the record suggests have similar arbitration clauses. *E.g.*, Dkt. No. 24 at 11. The fact that Archer was an authorized dealer for the equipment at issue is essential to its claims. However, the exception carved out for actions seeking injunctive relief is problematic to the motions to compel arbitration. On the most superficial level, this lawsuit is clearly an action seeking injunctive relief since it *does* seek that relief. On the other hand, it does not seek *only* injunctive relief, and the Court is persuaded that damages (described in Paragraph 1 of the Complaint as "in the tens of millions of dollars") are the predominant relief sought. The incorporation of the rules of the AAA provides the answer to this problem, as those rules very clearly state that the question of the arbitrability of a dispute is referred to the arbitrator under the AAA rules.

In *Petrofac, Inc. v. DynMcDermott Petrol Operations, Co.*, 687 F.3d 671, 675 (5th Cir. 2012), the Court held that "We agree with most of our sister circuits that the express adoption of these [AAA] rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." If there were no reasonable construction of the contract that allowed for arbitration, there would be nothing for an arbitrator to decide. However, there is in this case a plausible construction calling for arbitration. Thus, the question of whether the exception for actions seeking injunctive relief should be limited

to actions for an injunction in aid of arbitration or to enforce an arbitrator's award, should properly be left for the arbitrator to decide.

The case relied upon by Archer actually supports this analysis. In *State of New York v. Oneida Indian Nation of New York*, 90 F.3d 58, 62 (2nd Cir. 1996), the Court held that "While it is true that exclusionary clauses should not be given expansive readings, here the language excluding a certain class of disputes from arbitration was *clear and unambiguous*." (emphasis supplied). As shown above, that standard has not been met here.

The next question is whether non-signatory defendants can avail themselves of the arbitration clause. Both sides agree that *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524 (5th Cir. 2000), is the controlling authority on the application of the doctrine of equitable estoppel in this circumstance, namely whether Archer is estopped from asserting the lack of privity against the non-signatory defendants who seek to compel arbitration.[2] In *Grigson*, the Fifth Circuit expressly adopted the Eleventh Circuit's test applying equitable estoppel to non-signatory parties seeking to compel arbitration of "intertwined" claims. That test provides:

> "Existing case law demonstrates that equitable estoppel allows a nonsignatory to compel arbitration in two different circumstances. *First, equitable estoppel applies when the signatory to a written agreement*

---

[2] Because both sides agree that Grigson is controlling, the Court need not consider whether *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (U.S., 2009) would call for further analysis under state law.

> *containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory. When each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate. Second, application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. Otherwise the arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted."*

Id. at 527. (emphasis original). Both branches of the test appear to apply here. First, Archer has to rely on its written distributorship agreement with Pelton & Crane in order to allege that it was wrongfully excluded from the market (e.g., Complaint ¶ 32, Dkt. No. 1 at 10). Second, the conspiracy alleged between Schein and the Manufacturer Defendants alleges "substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." Finally, the Court cannot presume that the defendants did act wrongfully, which would be necessary in order for equity or fairness to override the application of the doctrine in this instance.

Accordingly, the Motions to Compel Arbitration are granted and this action is stayed pending arbitration of the claims asserted herein. All parties are directed to notify the Court when the arbitration process is complete or if it has been abandoned.

SIGNED this 28th day of May, 2013.

/s/ Roy S. Payne
Roy S. Payne
United States Bankruptcy Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-41674

ARCHER AND WHITE SALES, INC.,

Plaintiff-Appellee

v.

HENRY SCHEIN, INC., DANAHER CORPORATION, INSTRUMENTARIUM DENTAL INC., DENTAL EQUIPMENT LLC, KAVO DENTAL TECHNOLOGIES LLC, AND DENTAL IMAGING TECHNOLOGIES CORPORATION,

Defendants-Appellants

Appeal from the United States District Court for the Eastern District of Texas

---

Before HIGGINBOTHAM, GRAVES, and HIGGINSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that Defendants-Appellants' motion for stay pending appeal is **DENIED**.